

**IN THE CIRCUIT COURT OF THE TWELTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CIVIL DIVISION**

Michael T. Flynn,
Plaintiff,

v.

Case No.: 2023 CA 004264 NC

Jim Stewartson,
Rick Wilson
Defendants.

_____/

**DEFENDANT STEWARTSON'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE TO AMEND**

I. INTRODUCTION

Defendant JIM STEWARTSON opposes Plaintiff's Motion for Leave to Amend the Complaint on the grounds that leave to amend has been abused, amendment would be highly prejudicial to the Defendant, and that allowing Plaintiff to proceed under the Second Amended Complaint would be futile.

Generally, "leave to amend a Complaint should not be denied unless the privilege is abused, the opposing party will be prejudiced, or amendment would be futile." *Gerber Trade Fin., Inc. v. Bayou Dock Seafood Co.*, 917 So. 2d 964, 968 (Fla. 3d DCA 2005) (citing *World Class Yachts, Inc. v. Murphy*, 731 So. 2d 798, 800 (Fla. 4th DCA 1999)); *see also* Fla. R. Civ. P. 1.190(a). In this instant case, leave to amend should be denied as there is indicia that the privilege is being abused, the Defendant will be prejudiced, and amendment will be futile.

When denying a Motion for Leave to Amend, the trial court should make specific findings delineating the prejudice to the opposing party, the number of prior amendments, or the futility of trying to amend. *Carnival Cruise Lines v. Nunez*, 646 So. 2d 831, 833-34 (Fla. 3d DCA 1994).

II. PLAINTIFF'S AMENDED COMPLAINT IS PREJUDICIAL TO DEFENDANT STEWARTSON.

a. The Amended Complaint adds conduct that took place after the initial filing of the Complaint, and thus does not relate to the same specific conduct, transaction, or occurrence between the parties.

An amended cause of action is permitted only if it is based upon the same **specific conduct, transaction or occurrence** between the parties upon which the Plaintiff tried to enforce his original claim. *Turner v. Trade-Mor, Inc.*, 252 So. 2d 383, 384 (Fla. 4th DCA 1971); *Agate v. Clampitt*, 80 So. 3d 450, 452 (Fla. 2d DCA 2012). The Florida Supreme Court has clarified that “as long as the initial complaint gives the defendant fair notice of the general factual scenario or factual underpinning of the claim, amendments stating new legal theories can relate back” under the theory that they arise under the same specific conduct, transaction, or occurrence. *Palm Beach Cty. Sch. Bd. v. Doe*, 210 So. 3d 41, 44 (Fla. 2017).

In this case, the initial Complaint did not give the Defendants fair notice of the general factual scenario or factual underpinning of the claim. While slightly different facts or different theories of recovery do not preclude a finding of relation back, such facts and theories must not be factually distinct from those in the original complaint. *Kopel v. Kopel*, 229 So. 3d 812, 817 (Fla. 2017).

In this instant case, the factual underpinning of the Second Amended Complaint is different than the original Complaint or first Amended Complaint as it alleges a vastly different amount in controversy. Namely, the original Complaint alleged \$75,000 or less in damages while the first Amended Complaint alleged \$10 million in damages and the proposed Second Amended Complaint alleges \$50 million in damages. Such divergent monetary damages clearly are not based upon the same factual underpinning.

The Second Amended Complaint also alleges additional conduct that was not alleged in the original Complaint or first Amended Complaint, and that conduct took place after the filing of the original Complaint. Paragraph 7 of the proposed Second Amended Complaint makes allegations regarding Defendant

Stewartson joining the MeidasTouch Network on October 22, 2023, and makes allegations regarding MeidasTouch (a new Defendant that the Plaintiff is seeking to add) assisting Defendant Stewartson in his conduct. Because it alleges a role played by a new entity at a time after litigation commenced, the proposed Second Amended Complaint does not relate to the same **specific conduct, transaction or occurrence** between the parties upon which the Plaintiff tried to enforce his original claim or his original Amended Complaint.

III. PLAINTIFF'S AMENDED COMPLAINT IS FUTILE.

A proposed amendment is futile if it is insufficiently pled or is insufficient as a matter of law. *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 871 (Fla. 2d DCA 2010). The Plaintiff's Second Amended Complaint is both insufficiently pled and is insufficient as a matter of law.

a. Plaintiff's Amended Complaint is insufficiently pled.

In both his Motion to Dismiss the Complaint and Motion to Dismiss Amended Complaint, Defendant Stewartson identified insufficient pleading by the Plaintiff in the Complaint and Amended Complaint. However, the Plaintiff has failed to cure that insufficient pleading. Importantly, the assessment of legal sufficiency of a libel or defamation complaint by a public figure, such as Plaintiff, is subject to a more rigorous set of tests to determine legal sufficiency than most other types of cases. *Greene v. Times Publ'g Co.*, 130 So. 3d 724, 728 (Fla. 3d DCA 2014).

Plaintiff's Count I of the proposed Second Amended Complaint (Defamation and Defamation *Per Se* against all Defendants) is insufficiently pled. Based on his own pleading and common knowledge, Plaintiff is a public figure. Yet, he has failed to plead the elements of defamation of a public figure. The five elements of a legally sufficient cause of action for defamation involving a public figure: (1) publication, (2) falsity, (3) the defendant's knowledge of, or

reckless disregard for, the falsity (i.e., actual malice), (4) actual damages, and (5) the false statement must be defamatory. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). The Plaintiff has provided nothing beyond its bare allegations that Defendant's statements are false or that the defendant knew or recklessly disregarded the falsity of his statements. Additionally, Plaintiff has offered no tangible allegations of monetary damages, or evidence of the other damages claimed.

Plaintiff's Count II of Injurious Falsehood is also insufficiently pled. To sufficiently plead Injurious Falsehood, a Plaintiff must allege (1) a false statement was made by or on behalf of the tortfeasor; (2) the statement disparages a property interest of the complainant; (3) the statement was published or communicated to a third person; (4) the statement was made with legal malice or with willful and wanton disregard of the rights of the complainant; (5) publication of the statement is a material and substantial cause of inducing other persons to refuse to deal with the complainant; and (6) the publication results in special damages to the complainant.

Plaintiff has failed to clearly allege that Defendant's statements disparage his "property interest." Plaintiff is engaged in the business of "promoting election integrity and reform" (as described in Second Amended Complaint ¶ 147). The statements that the Plaintiff directly alleges (in Second Amended Complaint ¶ 148) as disparaging his property interests do not directly relate to that business.

Additionally, the Plaintiff has failed to allege that Defendant's conduct is a "material and substantial cause" of inducing other people to refuse to deal with the Plaintiff in his business. While the Plaintiff does allege (in Second Amended Complaint ¶ 152) that the Defendant intended to harm the Plaintiff's business through his statements, that is a materially different allegation from the Defendant's publication of statement actually being a "material and substantial cause" of other persons refusing to deal with him. Additionally, the Plaintiff offered no proof or evidence of Defendant's intent to harm Plaintiff's

business. Therefore, the Plaintiff has failed to sufficiently plead his count for injurious falsehood.

b. Plaintiff's Amended Complaint is insufficient as a matter of law.

This argument is similar to Defendant Stewartson's Motion to Dismiss the Amended Complaint on anti-SLAPP grounds, which offers an in-depth explanation on the law regarding the journalistic use of rhetorical hyperbole, the constitutional protections afforded to such speech, and the applicability of anti-SLAPP laws. Such arguments are incorporated by reference into this Memorandum, and based upon such arguments, the proposed Second Amended Complaint is insufficient as a matter of law.

Additionally, to demonstrate defamation involving a public figure, the Complaint needs to be more than bare factual allegations. *Greene v. Times Publ'g Co.*, 130 So. 3d 724, 728 (Fla. 3d DCA 2014). This proposed Second Amended Complaint does not rise to that level, and thus leave to amend should be denied.

WHEREFORE, Defendant Jim Stewartson respectfully requests that this Court enter an Order denying Plaintiff's Motion for Leave to Amend, and grant Defendant any other relief it deems proper and just.

Dated: December 14, 2023

/s/ Craig A. Whisenhunt
Craig A. Whisenhunt, Esquire
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and proper copy of the foregoing document was served upon Jared Roberts, Esquire and Leonard Collins, Esquire via Florida E-Filing Portal on this 14th day of December, 2023.

/s/ George K. Rahdert

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